FILED
NOV 17 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1921

Calendar No. 257

CHARLES D. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT EDWARD SWANN AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Appellant, Edward Swann, District Attorney of the County of New York,
Municipal Building,
New York City.

JAMES A. DONNELLY,
HARRY HERTZOFF,
of Counsel.

Ingle, Inc., 165 William Street.

INDEX

PAGE

Statement 1

I. Appellee's evasive reply to appellants' contention that neither before the Special Master nor in the Court below did defendants have their day in court 3

II. Appellee's misleading statements in its discussion of the sufficiency of the test period 6

III. Appellee's reply to appellants' contentions as to the erroneous admission in evidence of complainant's books is evasive and inconclusive 13

IV. What might have been done by appellants to restore the statutory rate is wholly irrelevant.. 16

V. Appellee's baseless attack upon the appellants' evidence 18

VI. Appellee misstates the processes by which the Special Master and Judge Hand reached their conclusions and sets up a distorted picture of the record 39

VII. Appellee's statement that there is no merit in the claim of appellants to the effect that appellee did not comply with the 22 candle power standard fixed by the statute is mere assertion 43

VIII. Working capital 56

IX. Some criticisms of appellee's attack on the "Rate Base" 58

Conclusion 60

IN THE

Supreme Court of the United States

October Term, 1921

Calendar No. 257.

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

REPLY BRIEF FOR APPELLANT SWANN.

Statement.

The argument of the appeal was set by this Court for October 10, 1921.

On September 19, 1921, six copies of the brief on behalf of appellant Swann were served upon the appellee.

On the 4th day of October, 1921, appellee moved this Court to postpone the argument. Thereafter, and on the 10th day of October, 1921, this Court set the appeal for argument for November 14, 1921.

On the 5th day of November, 1921, appellee served upon the appellant Swann six copies of its "General

Brief," consisting of 60 pages, and galley proof, consisting of 495 pages, of its main brief.

Appellee has had practically seven weeks since the receipt of appellants' briefs, in which to prepare its answer thereto.

Within the limited time at the disposal of the appellant Swann, it has not been possible, nor is it necessary to answer fully all of the misleading and utterly irrelevant statements contained in the two briefs submitted on behalf of appellee. We are satisfied to direct this Court's attention to a few errors in appellee's brief, which, we honestly believe, are the result of incurable recklessness. We may say in passing that appellee's "General Brief"—particularly that part of it in which is discussed the standing of the three appellants and "the attacks upon the Special Master" reads like a peevish wail that the defendant public officials had the temerity either to oppose appellee's efforts to set aside the 80-cent gas statute or to comment upon the methods by which the nullification of the statute was accomplished. Appellee's attitude appears to be that the case should have been tried without opposition. Appellee's counsel deliberately ignored the pertinent language of this Court in *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1, 8, to which reference will presently be made.

POINTS.

I.

Appellee's evasive reply to appellants' contention that neither before the Special Master nor in the Court below did defendants have their day in court.

Appellee attempts no discussion of the instances in which we direct this Court's attention to the numerous occasion on which appellants' legal rights were prejudiced by the Special Master's unjustifiable conduct and erroneous rulings. The hopelessly inadequate nature of appellee's reply to this point is significant. It is tantamount to an admission that there is no answer to appellants' complaint. Appellee's counsel knows that if he endeavored to dispute or even to explain the appellants' citations from the record, he would involve himself in inextricable confusion. He, therefore, contents himself with the hopeless effort to brush aside appellants with the mere assertion that "every presumption is in favor of a full and complete trial upon a record such as this, *especially in a case tried without a jury.*" (Appellee's General Brief, p. 16; italics ours.)

If the part of the above-quoted sentence from appellee's General Brief was thrown in as a saving clause, we are confident it will not influence this Court's determination. The fact that the case was tried without a jury cannot successfully be urged in justification of the outrageous violation of defendants' right to a fair trial. This is a right so sacred to all litigants that it makes no difference whether the case was tried before a jury or not. The fact of a jury's presence merely

aggravates whatever errors may have been committed by the trial judge in its hearing. Nor does the circumstance that the record in this case is as voluminous as it is of itself carry any presumption that the trial was fair, orderly and in accordance with the rules prescribed for the protection of litigants. If we were to say anything more on this point, we would merely be repeating what has already been urged in our Main Brief.

We, therefore, deny that "every presumption is in favor of a full and complete trial upon a record such as this."

This Court has stated in clear and unequivocal language that it will not be bound by presumptions of the character to which appellee's counsel has alluded, but will itself make a careful examination of the record for the purpose of ascertaining whether or not in a case such as this, involving the constitutionality of a State statute, the decision of the Special Master and the Court below is right.

In *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1, 8, this Court, speaking through Mr. Justice MOODY, said:

> "There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. *In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case.*
>
> "Nothing less than this is demanded by the respect due from the judicial to the legislative

> authority. It must not be understood that the findings of a master confirmed by the trial court are without weight, or that they will not as a practical question sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit." (Italics ours.)

On page 16 of his General Brief, the appellee's counsel states (italics ours):

> "The whole attitude of counsel for the defendants * * * was one of * * * *insolent discussion;* and the thousand objections which the Master himself interposed are but a trifling percentage of all of the objections made by the defendants with which this record teems."

The record will be searched in vain for any expression which even suggests that any of appellants' counsel revealed the slightest lack of respect for the office which the Master held.

It is significant that no attempt is made by appellee's counsel, even to palliate the constantly repeated expressions of contempt for our judges and legislators, which proceeded from the mouth of the Master. We venture the statement that no record of a judicial proceeding ever came before this or any other court which bristles with so many illustrations of insolence on the part of the Master.

The fact that "the thousand objections which the Master himself interposed are but a trifling percentage of all of the objections made by the defendants" will not entirely explain the unnecessary volume of this record. The Master undoubtedly contributed to the great size of the record by his constant and unwarranted interference with the examination of witnesses by defendants' counsel. Out of about 67,000 questions asked by all counsel, the Master asked approximately 18,000.

II.

Appellee's misleading statements in its discussion of the sufficiency of the test period.

In his General Brief (p. 31) appellee's counsel states:

> "• • • Before the modified decree of February 28, 1921, was entered, the Court had before it the experience of the company's operations *for more than three years*, as well as its own knowledge of the undisputed and controlling facts." (Italics ours.)

What the Court had before it was not "the experience of the Company's operations for more than three years," but testimony taken on the trial of the action covering twenty months, to wit, the year 1918 and the first eight months of 1919.

In the decrees entered herein on August 4 and August 11, 1920, Judge LEARNED HAND provided that

> "Until March 1, 1921, the complainant should be limited to $1.20 in the price it might charge for gas, and that if before that time a rate should be fixed by competent public authority, the master should distribute the sum deposited in Court above eighty cents as though that rate had been in force from the date of the decree, but if no rate had been promulgated, that he should turn over the sums impounded to the plaintiff" (Rec., Case 288, p. 60).

On the 15th day of February, 1921, the appellants (defendants below) applied for an extension of the above mentioned period "either indefinitely or to some stated time, the limit to remain as before, and the provisions for distribution in accordance with the new rate to be retained" (Rec., Case 288, p. 60).

Appellants' motion came on before Judge HAND on the 27th day of February, 1921, and resulted in the modified decree of February 28, 1921. On said motion, appellee (plaintiff below) submitted an affidavit verified by its Vice-President, Robert A. Carter, the 26th day of February, 1921, in which said Carter set forth certain alleged increases in the prices paid by the Company for coal, oil and labor *"since the period covered by the proofs before this Court as a basis for the decree of August* 11, 1920" (Rec., Case 288, p. 14). These alleged increased prices were stated to have been taken from the Company's books. Defendants had made no examination of said books nor were they given the opportunity to make any examination thereof. In disposing of the motion Judge HAND said:

> "The first question is of an extension of the limit of one dollar and twenty cents. When this was set, all the data were taken from the evidence at the hearing, and the limit was based upon the utmost sum which it could be supposed that the plaintiff could be allowed to charge by the public service commission when it acted. *At that time the plaintiff was apparently content with the limit, because on the reargument it challenged only what it mistakenly calls the 'retroactive' features of the decree.* Since that time it has had over six months' experience with that limit, and it presents figures, which, if true, show that it cannot make a profit of three per cent, since its costs of manufacture and distribution have arisen to over one dollar and ten cents. With a possible profit of $.32 and income taxes of $.03, the rate comes to more than one dollar and forty-five cents. Indeed, its estimates, based upon the prices obtaining at the end of the period, are somewhat higher. Some of the items, as for example, the difference between gas produced and gas sold at ten per cent, are clearly too high, but the difference is not very substantial in result. *The defendants, on the other*

hand, challenge the figures so produced, especially the cost of oil and coal, which account for most of the increase.

"The issue, as I have already said, is misconceived. *Of course, I cannot at present undertake, especially on affidavits, to decide* whether the plaintiff's claims are too high, nor would it be of service if I could. *Nothing can be decided as to how much the plaintiff shall eventually retain, but only how much it shall presently collect.* In that I should have to be guided substantially by what the plaintiff claims so long as it makes a prima facie case for its figures. *The evidence is not sufficient to make any finding, and this is in any event not the time to do so*" (Rec., Case 288, pp. 61, 62). (Italics ours.)

In appellee's General Brief and its main brief the statements contained in Carter's affidavit are woven into and made a part of its argument, apparently in the hope that by constant reiteration this Court might lose sight of the fact that the figures contained therein were, in part at least, the basis of the decree which held the New York Eighty Cent Gas Statute unconstitutional. It seems unnecessary to stress the fact that no court will decide upon mere affidavit issues so vitally important as those in the instant case.

In his opening statement in his main brief appellee's counsel claims that appellants argue that the Court below, acting in an arbitrary fashion, permitted appellee to charge high rates in the face of rapidly declining costs of coal, oil, and other gas making materials and rates of pay for labor. Appellee contends that, when the decree was entered, the peak of prices for gas making commodities had not been reached and that a deliberate misstatement had been made in our claim that prices rapidly declined after the opinion of Judge Hand was written.

The obvious answer is, appellants take the position that the Court below would not have made a decree in favor of appellee if it had not been misled by the Master's prophecy that the price conditions of the first eight months of the year 1919 had been followed by prices very much higher, and that these higher prices represented a new normal level that would not be changed for a period of at least five years. Appellee says (p. 17): "The sole issue was and is: Had the 80 cent rate fixed in 1906 become confiscatory at the time of trial and decree?" It is our claim that the sole issue was and is: Did appellee secure from the 80 cent statutory rate a fair average return upon the capital actually invested from the date of the legislation to the date the decree was handed down.

Appellee, on the very same page (p. 17) where he claims this was and is the issue, states: "When Judge Hand found that the 80 cent rate *would still remain* confiscatory by a wide margin, he suspended its further enforcement."

Appellee further says in effect that the issue is and was—had the rate *become* confiscatory *at the time of trial and decree;* and on the very same page argues that the Court found the rate *would still remain* confiscatory.

In other words, appellants believe and have asserted that the Court below really did not find the statute was confiscatory *at the time of trial*, but he was led to believe it might be so, or, as appellee puts it, would still remain confiscatory presumably for the prophesied five years.

We have proof that Judge Hand was influenced by the prophecy of the Master. For instance, appellee asserts at page 17: "(1) He limited the Company to a rate intended merely to escape the margin of confiscation until such time as the State regulatory authority might fix a new rate." Judge Hand found that in the

first eight months of 1919, appellee, by reasonable management, *should have had* available for profits "* * * $.1169" per M. cubic feet of gas sold and then limited the collection during the period of the appeal to $1.20 per M. cubic feet. This was an increase of $.40 per M. cubic feet. Adding this $.40 to the $.1169 we get "available for profits" $.5169 per M. cubic feet of gas sold. Judge HAND stated that the rate base as found by him was equivalent to $3.36 per M. cubic feet of annual sales, or, with "franchises" included, $3.63 per M. cubic feet of gas sold per annum. Assuming the higher figure, $3.63, and 6% return, the amount needed for return on the rate base would be equivalent to $.2178 per M. cubic feet of gas sold. The appellee, by reasonable management, would have had in 1919 the $.1169 per M. as found by the Court below, and Judge HAND allowed appellee to increase the available profits on this basis to $.5169 per M. To meet all reasonable expenses and 6% return, the Company needed as already shown 6% on $3.63 of investment at the most; in other words, $.2178 above operating costs. It had $.1169. An additional $.1009 was therefore needed, according to the Court below, for that particular year of 1919. Did the Court allow $.1009? No. Judge Hand allowed an additional $.40 per M., so that he really allowed $.5169 per M., which is more than 14% return on the rate base that he found, namely $3.63 investment per M. cubic feet of gas sold per annum. It follows that if the Court below, as appellee alleges, limited the Company "to a rate intended to barely escape the margin of confiscation," then he did not rely upon the reasonable operating expenses found by him for either of the years 1918 or 1919.

Judge HAND, in allowing a $.40 increase per M. cubic feet of gas sold, said: "It appears to me that it is *within the bounds of possibility* that the rate may be

fixed so high when it is * * *." He was evidently trying to predicate a *future* rate *at its maximum.*

Never let it be forgotten that the Court below absolutely ignored past profits under the rate. He *assumed* the rates in the past were no more than reasonable. He found a profit should have been available in 1918 of $.1813 per M. cubic feet and $.1169 in 1919. He evidently gave no thought to the enormous contingency surplus of over $12,000,000 which the Company had charged against operating expenses in the years prior to 1918. He evidently based his findings and decree solely on the prospect that prices for gas making commodities and labor would be much higher after 1919 than they were in 1918 or 1919 and prophesied that they would remain at this high figure for a period of at least five years. It is for that reason that the appellant District Attorney referred to Judge HAND's prophecy of a new level of prices. It has been shown to be a mere speculation and is not supported by facts of which this Court will take judicial notice.

Appellee asserts (p. 19): "Even in the spring of 1920 the rate required for adequacy was not less than $1.50 per thousand cubic feet." It relies for its statement on what it calls the record in case No. 288, but at page 61 in that record Judge HAND stated he would not go into the question of fair cost when he changed his decree. Appellee therefore fixed its own rate of $1.50 per M. cubic feet M. cubic feet, and did so on the basis of an affidavit by its Vice President Carter which purported to give the book cost of making gas. Judge HAND decided that the book costs were not to be relied upon as the fair cost of producing gas, and the affidavits of Carter are therefore not a fair test of the reasonable operating expense.

Appelle asserts at page 19: "The Legislature had seen fit to withhold from the Regulatory Commission any power to grant increased rates called for by changed conditions. * * * " The Legislature in its wisdom saw the danger of allowing one of its creatures to annul a statutory rate that had been fixed after mature deliberation. It knew that 80 cents was a high enough price for gas in 1906 and realized the price ought to be gradually reduced as the volume of sales expanded. In its far-seeing wisdom it provided against upheavals, wars and other extreme hazards because it permitted the State Commission to leave the $.80 rate in effect even when the immediate conditions might permit of a lower rate. It realized contingencies might arise that could make the $.80 rate non-compensatory for a year or two and it gave a mandatory direction to the Commission to compel it when considering rates to give "* * * due regard, among other things, to a *reasonable average return* upon capital actually expended and to the necessity of making reservations out of income for *surplus and contingencies.*"

III.

Appellee's reply to appellants' contentions as to the erroneous admission in evidence of complainant's books is evasive and inconclusive.

The argument based upon the quotation from Wigmore at page 206 of the main brief of appellee's counsel and upon the authorities cited in other parts of his brief in apparent support of the principle enunciated by Wigmore, is not controlling. All that Wigmore says may be true of ordinary business entries. But, in this case, in which the action was brought by complainant to set aside as unconstitutional the 80-cent gas rate, the entries in complainant's books do not *ipso facto* establish *operating efficiency and economy.*

To *prove efficiency and economy* in its operation, complainant should have called its plant superintendents who presumably possess personal knowledge of the details which enter into the complainant's manufacture and distribution of gas.

At page 33 of his main brief appellee's counsel states:

> "Obviously, uniformity in operating results could not be attained with different personnel at the various plants and under conditions varying throughout the year."

At page 51:

> "The art of gas manufacture has not become so exact as to admit of no variation in mechanical and personal performances."

At page 139:

> "It is impossible to obtain uniformity in the cost of manufacture as between the stations of complainant or of its affiliated companies, nor is it possible to obtain uniformly better results at one station than at another station. In other words, the cost of manufacture varies between the stations, due to circumstances and conditions beyond the control of the operating department. These variations are due to differences in the qualities of materials employed, in the efficiency of labor and in the efficiency of apparatus, which is not always uniform."

Expressions by appellee's counsel similar to those quoted could be cited, but these are sufficient, we think, to emphasize our contention that the efficiency of complainant's plants was not proven and that differences in the degree of efficiency with which complainant's plants were operated cannot be determined from dumb book figures. The deficiency of complainant's book evidence is made apparent by the fact that the appellant Swann showed affirmatively the great lack of efficiency in complainant's plants.

It is idle for appellee's counsel to contend as he appears to do in his main brief, that differences in operating efficiency at complainant's plants are due to causes over which complainant has no control. As this is a matter which is susceptible of proof by those having personal knowledge of the facts, it should not be left to mere assertion. While it may or it may not be true that complainant does not control the quality of the coal and oil which it receives, there can be no question that it alone can and does govern the design and operating efficiency of the apparatus which it uses. Whether or not this apparatus was used so as to produce reasonable econ-

omies in production and distribution was not attempted to be established by complainant.

In view of what has already been urged in our main brief, appellants rest with entire confidence upon the contention that the procedure which should have been followed at the trial was to have the complainant call a limited but sufficient number of witnesses personally familiar with the underlying data to show, if it could, that as its books correctly record the transactions for a selected period, there is a "circumstantial guarantee" that the entries therein accurately detail the transactions for the entire period covered by said books.

IV.

What might have been done by appellants to restore the statutory rate is wholly irrelevant.

Appellee states (p. 20): The New York Court of Appeals soon held, as the Appellate Division had already held, that upon the entry of an injunctive decree * * * the State Commission became immediately vested with power to regulate and revise any rates promulgated. * * * " As to this so-called power of the Commission, Judge HAND had it in mind when he wrote the opinion as is shown by the following: "Indeed, that might have been thought to be now the law had the opposite not been declared in *People ex rel. Municipal Gas Co.* v. *Public Service Commission*, 224 New York, 156."

Appellee refers to the filing of the $1.25 rate with the Commission August 1, 1921, and says this is a matter of public record. It fails to notify the Court that in Case No. 79 the Public Service Commission on its own motion, after it decided that it needed information as to the cost of producing gas, ordered every company in Greater New York to file data for its use preparatory to the taking of testimony on which the Commission could base its findings and make orders in respect to a fair rate for gas service. Appellee therefore misstates the fact when it says that, "No step has been taken by the Commission * * * to obtain a restoration of the $.80 rate." It is true that no steps have been taken before the Court at whose hands the rate was held to be confiscatory, but the Commission has no need to go before any Court because it can now of itself fix rates and evidently intends to do so in the very near future. It is further to be noted that, appeal having been taken, the moneys collected in excess of the $.80 rate are being impounded

pending a final decision. This shows that appellants are taking steps to restore the $.80 rate. It is further to be noted that Judge HAND said at page 62 of the record in Case No. 288, that the Commission could not be expected to fix the rate while this appeal is pending.

Appellee apparently seeks to find some consolation from the orders issued by the Federal Courts in certain cases recently under consideration, as shown on page 22 of the brief. It may well be asked, what comparison can be made between the rates temporarily allowed to such small exclusively water gas production companies as the Brooklyn Borough Gas Company, with those of the huge, combined coal gas and water gas production system of the type of the Consolidated Gas Co. and the Astoria Light, Heat and Power Co.? For what purpose can the appellee refer to the temporary injunction granted to the small water gas production plants operated by the Bronx Gas & Electric Company? said injunction being granted in the State Court. This issue is now being tried as to said company not only in the State Court, but also before the reorganized Public Service Commission, and all of the moneys collected in excess of the statutory rate are being impounded. Furthermore, what interest is it that the Stautory Court said certain things about the rate of some unnamed gas company? Six of the companies which have been granted the temporary injunctions are very small and distribute only a moderate amount of gas, and none of the said six make any gas in plants of their own, but purchase it from a parent company.

V.

Appellee's baseless attack upon the appellants' evidence.

Appellee claims (Main Brief, p. 28) that its right to judgment would be confirmed by the admission of Mr. A. S. B. Little at page 11,291 of the printed record. "Mr. Little was the only witness called to the stand by the defendants who possesses any expert or first hand knowledge of gas manufacture and distribution or of the cost necessarily incurred therein." A fragmentary part of Little's testimony is then given, page 28, in which the only word quoted from the witness is "No."

Appellee misleads the Court by this quotation.

At the outset of Mr. Little's testimony on this subject, counsel for appellant Swann questioned him concerning the basis for his figures of cost beyond the holder, generally called distribution expense, as distinguished from the cost incurred at the production plants. Little very definitely stated that he used the "distribution costs" as reported on the books but did not accept the figures as reasonable. On the cross examination, the following testimony was given:

> "Q. Mr. Little, by these tables which you have made up in this exhibit, do I understand it to be your view that under present costs of labor and materials, and with present plants, this complainant company can make and distribute gas at $.80 and earn a fair return on necessary investment?"

After objections and exceptions, the witness answered:

> "A. You are asking me for my opinion?
> Q. Yes, or what you intended to convey by these tables?

A. I intended to convey that—I do not know anything about the investment, the fair cost of the property, the fair value of the property, the fair operating expenses, beyond the holder, but I have used certain figures, and I do not know whether or not the rate is sufficient for the character of service given, because that is something entirely for the Master to decide."

After further questions the Master asked:

"Q. Do you intend to show by any of these tables that the Consolidated Company, with its present plants and with the prices of oil, coal and labor, can make and distribute gas for $.80?"

to which the witness answered "No." The Master, somewhat surprised, said, "What?" and the witness again answered "No." The Master came back, "What do you mean by 'No?' That it cannot be done or that it can be done or that you do not intend to show it either way?" The answer was, "I do not intend to show it either way. That is not my province. That is something for the Court to decide. I would not presume to infringe upon the duty of the Court." Counsel for the respondent then asked:

"Q. Have you formed any judgment or opinion on that?"

Objection was taken to this question. It was repeated. Further objection was taken and Mr. O'Brien stated very clearly that the witness was called to produce his opinion of production costs and the witness stopped there. To show the Master's attitude, we quote his statement in answer to Mr. O'Brien's objections.

"I am assuming that the question takes into consideration the fact that Little has taken the distribution costs as they were without any statement on his part that they are right or not. *Taking those figures,* he can answer this question."

After discussion the Master allowed the question and the witness said:

> "I would like to get the question very straight, Your Honor. I realize it is quite important."

After the witness answered "No," as shown on page 28 of appellee's brief, the following occurred:

> "Q. You do not believe it could?
> A. I do not. I will qualify my answer now, if I may.
>
> The Master: Yes.
>
> The Witness: Assuming, that is, the expenses beyond the holder, which I have taken, which are as nearly as I can show them, the fair costs based upon Mr. Teele's set up of the books, I do not know if they are reasonable or not. Some of them I believe are unreasonable" (Rec., p. 11,291).

There was no "rage" displayed by the representative of the defendant, Swann, and this was not what persuaded Mr. Little to qualify his answer, as appears very clearly from the record.

Little's testimony is perfectly clear in that he set up only what he believed was the fair production costs of the plants owned by the Company, in the condition in which they were,—that is, with all their faults of design, construction and lack of proper maintenace. His answer was based upon Teele's distribution costs, and he immediately stated, without any coaching or hints, that he believed these book costs or distribution expenses were unreasonable. Mr. Little's testimony was confined to the question to the operation of the plants of the Consolidated Gas Co. as of January, 1920, and the question took with it the operation of the Fourteenth Street coal gas plant which Judge HAND condemned on the basis of Little's testimony, the operation of the 42nd Street

plant which was similarly condemned, and the production of gas at the two water gas stations in Manhattan, owned and operated directly by the Consolidated Gas Company, appellee herein. Little was not asked as to the year 1919, the year 1918, or any of the previous years, and was not asked to take into account the enormous surplus that had been built up by this Company by its past operations. Little was also asked to assume that the plants of the appellee would meet the requirements of the law in respect to candle power quality of the gas. He was not asked to assume the prices that were being paid for coal and oil by appellee under contracts which were had, but was asked to assume the present prices. He took into account that there was a temporary upheaval in the gas oil market which may have been caused by the fact that the people from whom the Company buys oil control the price of gas oil and direct the policy of the Consolidated Gas Company.

On page 29 of its brief, appellee follows up its misleading claim by asserting that Little pared down the cost beyond the holder by assuming the sale of 22,000,000,000 cubic feet of gas in 1920, with no considerable increase in "expenses beyond the holder." On page 11,256 of the record, Little's testimony shows that the figures for all the distribution expenses beyond the holder are based upon appellee's exhibit showing the cost for twelve months, ending October 31, 1919. Mr. O'Brien laid the foundation for Little's testimony on distribution costs by asking: (Rec., p. 11,267.)

> "Q. Will you state how you have used these figures of Mr. Teele's and the purposes of them?
>
> A. Well, I used them to set up before the Master the final picture that would result if my production cost, as assumed and calculated, were added to by certain other figures which the Company had put in evidence.

Q. That is without passing at this time upon the reasonableness or their accuracy?

A. That is correct. Yes, sir. That is for the Master to decide. I would not want to set up my judgment on certain figures such as taxes. I do not know anything about taxes in the City of New York.

Q. Well, you said in some few instances, you have modified some figures of Mr. Teele's? Will you just explain how?"

Little gave a detailed answer to this, from which it is evident that in some cases where he used the cents-per-thousand-cubic feet taken from Teele's exhibit, he got a bigger cost in dollars per annum, while in other cases he used the dollars as shown on Teele's exhibit and got a somewhat lower cost in cents per thousand cubic feet of gas sold, due to the fact that he assumed a natural increase in the sale of gas.

"Q. For the current period?

A. In other words, I have not tried to change Teele's figures."

Appellee deliberately sets out to confuse this Court at page 94 of its brief when it states that Little allowed a station cost of 49.82165 cents per thousand as against the Master's finding of 50.63 cents and the Court's finding of 45.19 cents per thousand cubic feet. Turning to page 11,255 of the record, from which appellee quotes concerning this alleged figure of station cost, it will be found that Little's station cost is actually $.355937, and it is only after adding general expense at Astoria, return on book investment at Astoria, return on materials and supplies at Astoria, the allowance for accruing depreciation at Astoria, and the taxes on the Astoria investment, that Little reaches what he calls the gross operating charges, $.468691, to which he adds cer-

tain figures for the Manhattan properties, plus 7 per cent. for leakage, to arrive at what he calls, in item 14, "Cost in holder of gas sold, including annual charges on purchased gas," $.4982165 per thousand cubic feet of gas sold, which appellee in its brief states is Little's allowance for "station cost."

At page 95 of the brief, appellee alleges that Little threw his estimate of cost overboard when he discarded the assumption that 22 billion cubic feet of gas would be sold. Little did no such thing. He stated in the record that if the sales did not reach his assumed amount it would not affect his estimate of the cost of production and would not change the figures which he took from Teele's exhibit without acceding to their reasonableness.

At page 95 appellee alleges that, as the companies of the Consolidated system produced both water gas and coal gas, any saving which may be afforded for the time being by either process is secured to the extent that the capacities of the respective plants render such economies possible.

At this point appellee totally ignores that fact which was brought out so clearly by Little's testimony, that, notwithstanding the fact that the complainant did have at Astoria coal gas plants of not altogether antiquated design, it refused to use them to the extent of their capacity but, in fact, shut them down and elected to use the inadequate, inefficient, obsolete gas plants which it controls and operates by its direct management in Manhattan.

Also at page 95 of the brief, appellee refers to the alleged extensive experience of Mr. Woods, its engineer of manufacture, in the operation of both coal gas plants and water gas plants. Where is Mr. Woods' experience set up so that the Court can come to any such conclusion? With the exception of the building of a miniature plant in

Kentucky many years ago, it has not been shown in this record that Woods had any experience whatever in modern coal gas plants outside of the experience he gained through operating the plants that appellee has or controls in Greater New York. What experience has Woods had with coke oven plants or with vertical retorts or with modern horizontal, mechanically charged "through" retorts? That is the whole trouble with this Consolidated system, as indicated by Little's testimony. The company refuses to believe that anything good can exist outside of New York City gas plants. They have the brazen effrontery to claim that coke ovens for the production of coal gas are in an experimental stage. In Little's statement of his experience he shows that he, more than fifteen years ago, had made studies of coke oven designs of five different companies, installed at nine different places.

Going back for a moment to page 75 of appellee's brief, it is claimed that the Court in adopting the cost of producing coal gas at plant "A," failed to make due allowance for an important element. Appellee claims that the lower cost of production at coal gas plant "A" resulted *in part* from the use of certain labor saving devices which have not been installed in plant "B," but which entail a greater amount of investment over the investment in plant "B" and make the amount of return required upon the investment in plant "A" greater per thousand cubic feet of gas than the return required upon the investment in plant "B." This claim is positively unfounded. There is not one scrap of evidence in the record to justify any such claim. If appellee wants to go outside of the record it might refer the Court to the fact that when the chief engineer of the Consolidated Gas Company finally persuaded the executives to erect a modern plant at Astoria, it was decided to install, as a

test, one unit of inclined retorts and one unit of horizontal machine-charged retorts. The horizontal house as built was of a most elaborate description, and, in fact, the chief criticism of Little was as to the unwieldy machinery used in connection with this horizontal retort house. The horizontal house cost as much per unit as did the inclined retort house. The facts of the matter are that the inclined retorts, as originally put in, were a dismal failure. This German design, constructed with German materials in part, did not prove a success, and it was rebuilt with American settings of retorts. Appellee at that time took its losses or charged them up to the consumers so far as the inclined retort house "A" is concerned. In connection with the "B" house, however, originally designed with stop-ended retorts, which do not permit of full charges of coal being placed in the retorts, and which do not permit of the coke being pushed out by a mechanical means, Little testified that the original design has been continued in existence up to the present day. Little, in his criticism of this house, said that, even at this late date, it could be remedied by the expenditure of a few thousand dollars, which would bring it into good operating condition so as to produce gas as economically as on the "A" house.

At page 80 of the brief, appellee makes its first attempt to refute the argument of the appellant Swann (Point XI, pp. 339 *et seq.*). It makes an elaborate statement which does not answer the claim of the appellant Swann, and finally, on page 81, comes down to this amazing statement:

> "If Little meant *300,000 gross tons*, then, according to his figures, 216 lbs. of coal per thousand cubic feet of gas would be required."

Here again appellee tries to cover up the false statement it made to Judge HAND by making another false

statement to this Court. It unquestionably does this knowingly, because if reference is had to page 11211 of the record, to which appellee refers this Court, there will be found, under item 21, "Coal for retorts," the 300,000 tons assumed in Little's estimate of cost. Going to the details on the following pages which Little set up thoroughly for the convenience of the Court, under item 21 we will find (at p. 11216) the following:

> "21.—Coal for Retorts.—I have figured this at $5.28 *a net ton*, including handling and stores expense. In 1918 the cost *per gross ton* averaged $4.84746 plus $.15886, a total of $5.00632 *per gross ton* ($4.467518 *per net ton*)."

That there might be no misunderstanding whatever as to what Little meant by a net ton, he continued in his description of this item of "Coal for Retorts" as follows:

> "In the first eight months of 1919 the price per gross ton was $5.717664 plus $.19408 for handling, a total of $5.91174 (or $5.27834 *per net ton of 2,000 pounds*). I used the round price of $5.28 *per net ton*."

In dealing with the amount of coal used in making coal gas appellee alludes to the appellant Swann's brief and claims that he has misstated the use to which the coal was put. It is claimed (p. 82) that the relatively high quantity of coal required per thousand cubic feet of gas in recent years at 14th Street and 42nd Street coal gas plants was due to the short period of operation of these plants, some of the gas produced in the first few days being lost in purging out the system and through cracks always appearing in retorts; and also, when the benches are first started up, charges are not so fully or so evenly burned off, and therefore the yield is not so high. If counsel for appellee figured out this theory himself, then all we can say is that he is a poor

gas engineer. If these statements were given to him by Woods, the chief witness for appellee in the matter of gas manufacture, then an attempt has been made deliberately to mislead this Court. There is not a scrap of evidence in the record in support of the labored argument on page 82 of counsel's brief. The fact of the matter is that when retort benches of this kind are started up they should be in the best of condition, because before retorts are put into operation a splendid opportunity is given to repair all of the cracks in the retorts. Then comes the matter of firing up, and, in order to get the retorts hot evenly and as quickly as possible, the coke is not drawn out of them at the regular time for discharging the carbonized coal, but is left in there so that the heat in the coke will hasten the process of bringing the retorts into a good operating condition. This means that the exhausters draw upon the retorts long after all of the rich coal gas has been extracted, and, as a vacuum could not be created without destroying the retorts, this pull is exercised on the porous retorts so that furnace gases, which surround the retorts, are drawn through the pores and pass away with the gas coming from other retorts in the stack of benches. These gases are measured along with the ordinary coal gas and thus tend to swell the amount of gas measured per pound of coal carbonized. The assertion of appellee that a lot of gas is lost in purging the apparatus is absurd. One would imagine that millions of feet of gas are blown into the air and lost. Counsel for appellee would not have advanced this argument except in the hope and belief that it would mystify and mislead this Court. Some gas naturally gets away with the air when the purifiers are purged on the first day that the gas is allowed to come over from the recently fired retorts, but this amount is so small, when based upon one month's total operations, that it is negligible.

We will also ask where in this record appears any testimony to support what counsel for appellee states is a fact, and that is that the gas produced at the 42nd Street plant in earlier years included the oil gas produced for enrichment. If any such reference had been possible, counsel for appellee would certainly have given the page reference to the record.

Appellee then refers once more to appellant Swann's brief, pages 347-348, and claims that a chimerical cost has been set up on the assumption that a yield of 5.5 feet of gas per pound of coal should have been realized. In our brief we set up all of the factors that were taken into account in giving this cost to the Court, and it is evident that Little's testimony regarding the yield of gas took into account that such a yield would be of gas giving a candle-power at least as high in the coal gas as that secured by appellee in its operations of the coal gas plant "A" at Astoria. Little's criticism of the operations of the Astoria plant were directed to the amount of coal used, and also to the quality and quantity of gas produced in these coal gas retorts. This claim is substantiated by reference to page 11225 of the record and also to page 11195. Appellee claims that Woods' figure of 1.6 gallons of oil for enrichment was based upon the use of 200 pounds of coal per thousand, or not more than 5 cubic feet of gas per pound of coal used. Where in this record does Woods show what candle-power of gas would be produced in his hypothetical coal gas plant?

Appellee claims on page 88 of the brief that the Master and the Court below greatly exaggerated the significance and value of Little's testimony. Appellee has a hard task to reconcile the setting up on one page the qualifications of Little when it wants his figures to be accepted, and the use of its argument that Little's figures should be rejected. Both the Master and the Court

stated that they were impressed with Little's testimony. The Master stated that he got from the evidence of Little and Sangster, the engineer and accountant respectively of appellant Swann, more real help than he got from any other witness in the case. The Master said that he was so impressed with Little's testimony that he would take anything that Little offered, no matter who brought the matter out or how it was brought out by counsel.

When attacking Little at page 88 appellee claims that Little proposed the complainant might have scrapped its present plant and substitute a by-product coke oven system. It claims that Little suggested many millions of investment be scrapped and that an uncertain experimental mode of manufacture should be substituted. We have already shown that this coke oven system is no experiment. It was shown by Little's testimony that the system had been in use for many years and was now being adopted by every large progressive gas company in the country, including Chicago. In Chicago they went even beyond Little's recommendations by putting in this huge coke oven plant at a time when war prices for construction material prevailed. It could be shown that one of the executives of the Consolidated Gas system has erected these coke oven plants for the purpose of making city gas. It was shown that coke oven gas was used by the gas consumers in Detroit, Milwaukee, Minneapolis, St. Louis, Boston, Baltimore and throughout the territory served by the Public Service Company of New Jersey. Possibly the management of the Consolidated Gas Company does not know of these things, although they have been known to all other gas men for the past decade. Little did not say that millions of dollars of investment in old machinery should be scrapped. What he did say was that the company, instead of proceeding along the lines it has done for the past few

years of installing water gas sets so that the Standard Oil Company can get the benefit by selling oil to the Consolidated Gas Company, on the board of which sits William G. Rockefeller, Nicholas F. Brady, representatives of the National City Bank and others connected with the Standard Oil Company of New Jersey, should have built modern plants capable of making the gas cheaply, without the aid of the Standard Oil Company.

Little went so far as to say that the 14th Street and 42nd Street plants, which operate for a week or two in some exceptional years, but which we believe need not have been operated in the past five years, should have been scrapped years ago. Judge HAND went further than Little, and said that he would not base his costs on either the 14th Street or the 42nd Street plant, *or the 21st Street or the 99th Street plant.* In other words, Judge HAND believed that every one of appellee's manufacturing plants should be thrown out when considering the fair cost of producing a thousand cubic feet of gas.

We have before referred to appellee's attempt to set Little up as the one and only expert when, by garbling his testimony, it appeared to help appellee's case, and the later attempt to cast ridicule upon him when he criticized appellee's operations. The statement on page 91 of appellee's main brief is a deliberate falsehood, uttered by counsel in a desperate effort to deceive this Court. Counsel certainly did not deceive the Master, who had Little before him for several weeks, nor did the earlier misstatements have any effect upon Judge HAND's opinion of the witness Little. We refer this Court to pages 11162-11177 of the record, where Little's qualifications are set up in detail.

Appellee again garbles the testimony by referring to page 11334 of the record and claims that Little testified Illinois and Chicago companies were overstocked with coke that could not be sold. There is no reference in the

record to any coke being stocked in Chicago. All that Little said was that the gas company there was buying coke and paying $11.50 a ton for it, and that he advised them to go to St. Louis and buy some *retort house* coke at a lower price. There is not a word in the record to justify the statement that there was any coke-oven (by-product) coke stocked in Chicago or in St. Louis, or anywhere else.

The statement at page 92 of appellee's brief is not true, that Little sought refuge in an admission that he would not advise this company to install a coke oven plant in New York. To refute this misstatement we refer this Court to page 12379 of the record:

> "Q. When you, Mr. Little, in your last statement spoke about the feasibility or advisability of putting in a coke oven plant at the present time, *at present prices*, did you have in mind reproduction cost as of the present time or building costs?
> "A. Building costs, yes.
> "Q. What would you say as of a period from 1914 to 1917?
>
> "Mr. Ransom: I object to that as immaterial.
>
> "The Master: I will allow it.
>
> "A. The answer would be different entirely.
> "Q. And you would recommend it, you would have recommended it at that time?
> "A. Yes, sir."

Little advocated a coke oven plant, but he more strenuously advocated what is known as a chamber oven plant, which is a modified coke oven system; and nowhere in the record did he claim that the company, even in 1919, should not have erected this chamber oven plant to produce gas cheaply.

Appellee's counsel seems to realize that Little's testimony breaks down complainant's case. Hence, his fre-

quent and vicious misrepresentation of the record. As a further instance of our claim that counsel knowingly tries to deceive this Court, we refer to his statement at page 93 of appellee's brief, as follows:

> "Later he found that gas could not be made in this way; he had overlooked the late summer demand; plants could not be run to capacity in mid summer and stored for winter * * *"

Appellee then sets up some isolated testimony which in no way supports the argument that Little ignored the summer demand. To show that Little did no such thing we refer the Court to the really amazing detail with which he set up his plan, based upon 25 years' experience, of operating these plants. This will be found on pages 11191-11209, particularly at the head of page 11193, where he shows that he set up a distribution of sales by months in the year 1918, arrived at the percentage that each month's sales and each accumulated month bore to the total sales per annum, which figures he then used in all his subsequent tables. We also refer the Court to his table on page 11204, where he shows the "A" house operating to only 62½ per cent. of its normal *rated* capacity in the months of May, June, July and August, and 75 per cent. in the month of September.

Similarly we refer the Court to the table on page 11205, where it shows that Little assumed the horizontal house "B" would operate to 66.7 per cent. in May, June, July and August, and 75 per cent. in September. It will be remembered also that Little testified that the *rated* 100 per cent. capacity in the other months was only 10,000,000 feet per day in each of these houses, whereas each of them, although *rated* at 10,000,000 feet, could make and had made at least 12,000,000 feet per day.

Appellee refers to a plant in Vincennes, Indiana, operated by Little, and claims that the unaccounted for gas

in that plant amounted to 22 per cent. per annum (Brief, p. 91). Little made no claim for credit in operating the Vincennes plant, of which he was director and general manager for seven months solely for the purpose of finding out if gas could be compressed to 90 pounds per square inch in order to squeeze out toluol and make it available to the Government for the manufacture of explosives during the War. If his plan had been successful, thousands of gallons of toluol would have been available for the making of munitions—such toluol coming from plants which were too small to put in stripping apparatus for taking the toluol out of the gas. It is obvious that he *had* to use a small plant in order to demonstrate his theory that gas could be so handled for the needs of the Government in *even the smallest plant.*

Mr. Little said his experience as an operating gas engineer *in the employ of a gas company* was limited to the seven months spent by him at the Vincennes plant. Incidentally, this Vincennes plant was a central plant which made gas and distributed it at 90 pounds pressure to several towns in Illinois, and as appellee's counsel knows this to be the fact he should not try to mislead the Court into making a comparison of the leakage in said plant as compared with the leakage in plants operating at extremely low pressure.

Appellee criticizes Little for never having worked for any of the large gas companies, but that is one reason why a man like Little is invaluable in setting up testimony on behalf of the consumers of gas. Any man that has worked for the big companies directly—that is, has been in their employ—is forever tainted. He then merely reflects the opinions of his employers who, by intercorporate relations, control the destinies of every important gas corporation in the United States.

Appellee quotes sparingly from Little's testimony, at page 93 of its brief, and asks this Court to assume that

all of Little's figures were thrown out when he abandoned his twenty-two billion feet estimate of sales. Little's testimony shows that the sales of 22,000,000,000 feet might and should have been realized; but that, if they were not, the use of a smaller figure would not change his estimate of operating cost *expressed in cents per M. cubic foot of gas sold.*

Appellee claims that Little specifically omitted to make any provision for renewals and replacements on the property of the Consolidated Gas Company, computed by the Master at three cents per thousand cubic feet of gas sold. It thus attempts to have this Court "plus" Little's figures by three cents per thousand cubic feet, whereas, if any addition is to be made to Little's figures, it should be to the extent only of three cents per thousand cubic feet on the gas made *in the Manhattan plants.* Little showed that the great part of the gas sold could have been made at the Astoria plants and he allowed sufficient for renewals and replacements in his computations on the cost of producing gas in the manner set up by him.

May we emphasize the point that appellee has had a hard time in, first of all, setting up Little as the only witness whose experience and credibility are worthy of consideration and then, later, attempting to show that Little did not know what he was talking about? On pages 91, 92 and 93 Little is treated as a witness of no account and then, on the bottom of page 94, in a very guarded way, appellee asserts that Little's computations furnish as good a confirmation of the findings of the Court and the Master as could be expected.

The statement on page 96 of appellee's brief regarding the ease with which water gas costs can be computed is truly amazing. Even if true, of what use is it to a gas company to know that its water gas production is going to be so and so per thousand feet if those costs

are obviously higher than would be incurred in the production of a combined coal gas and water gas? The statement is, however, not true. There is no great difficulty in estimating the cost of coal gas at any time, for the simple reason, as appears clearly from the record, that when the cost of gas-making coal goes up the residuals obtained from said coal go up and entirely offset any increase in the price of coal itself. How can anybody know what the water gas is going to cost except the Standard Oil Company, which controls appellee's policy? Did appellee know, in 1919, what its water gas was going to cost it in 1920? If it did, it could only have known through the information given to it by William G. Rockefeller, who is on its Executive Committee and passes on every oil contract that is let by appellee to the Standard Oil Company. Possibly appellee *did* know, but we doubt it owing to the fact that the Standard Oil Company, which fixes the price of every gallon of gas oil used in the United States, does not announce its policies ahead of time, but apparently fixes its cost of oil according to the donations made by Mr. John D. Rockefeller, who first makes a donation and then raises the price on every derivative of crude oil.

Where is the uncertainty of prices which may be realized for coal gas residuals? If coal is scarce coke sells for a high price, and the extra price that you pay for that coal is counterbalanced by the excess receipts for residuals.

Appellee makes a specious argument on this coal gas proposition when, as a matter of fact, it does not know how to make coal gas. It does not know how to make gas on the gas plants that it controls. If it does know, it ignores the advantages which it possesses in having a coal gas plant when it shuts down such coal gas plant in order to permit expensive water gas plants to operate in Manhattan.

The appellant, Swann, has shown in his brief that this company has not the slightest idea of the price that is available to anybody making high-grade residuals in the manufacture of coal gas, because from all we have been able to determine it does not even know what by-product coke is. Its only witness who testified was Mr. Doane, who simply gave the whole case away by stating that the company had a wonderful market for coke sales and that coke was one of the oldest fuels known to the citizens of New York, but that the users had refused to put up with the stupid sales methods of appellee, who, at the will of its inefficient executives, made or refused to make coke, and thus did not provide a steady supply of coke to those who longingly looked forward to its use during the long and severe winters that we experience in New York City. Doane said that coke is the ideal fuel, and yet appellee by its amazing stupidity has thrown away this wonderful market at a time when it is getting more valuable because of the falling off in quality and the increase in price of anthracite fuel sold to domestic users.

Where is there one certainty regarding water gas costs that is indicated by the following quotation from page 96 of appellee's brief:

> "In other words, the cost of water gas manufacture can be determined with certainty, * * *"

When oil is selling at three cents a gallon or at six cents a gallon, you know approximately what it is costing you, but when the Standard Oil Company suddenly jumps that price to twelve cents per gallon, it is obvious that the price of water gas is practically doubled in cost. Oil is the principal item of cost entering into the manufacture of carburetted water gas.

Appellee states, on pages 96 and 97 of its brief, with a misguided assurance, that:

> "during the war period, high prices were obtained for coal gas residuals and the net cost of coal gas manufacture in 1919 was somewhat lower than water gas manufacture * * *"

These unprogressive gas executives are living in the past and appear to have no idea of the enormous profits that were realized by up-to-date gas companies during the War, through the sale of coal gas residuals. When fuel was practically unobtainable in New York, these people did not have a pound of coke for sale. When the European allies were crying out for gas products used in the manufacture of munitions these people did not have a gallon of toluol for sale, whereas it is common knowledge that other companies in the Middle West were selling toluol for five dollars or more per gallon. It may be remembered that when the United States Government later took over the supply of toluol and other light oils used in the manufacture of explosives, the price for toluene was fixed at one dollar per gallon. Just think, then, what enormous profits could have been made by this company in the sale of toluene or even of crude toluol at five dollars or more per gallon when it is a well-known fact that even at a dollar per gallon enormous profits were made by the gas companies who looked ahead and built plants to supply the Allies with this explosive base!

At page 92 appellee says that no comparison between the cost of production is fair which does not include the very important element of the greater cost of the necessary investment in coal gas plants than the cost of the investment in water gas plants. Appellee apparently forgets, or wishes the Court to forget, that it is claiming a return on an investment which includes coal gas plants. It fails to state that these Manhattan coal gas plants are

obsolete and produced gas at a prohibitive price when they worked spasmodically in recent years. It fails to remind the Court that it has, in fact, very large coal gas plants belonging to Astoria and that Astoria fails to operate these plants to anything like their capacity of production and shuts them down to a very large extent in the summer months when it wishes to keep running those plants of its own in Manhattan, which, presumably, it hopes to sell under condemnation proceedings as "going concerns" rather than as obsolete and antique relics of a past age.

VI.

Appellee misstates the processes by which the Special Master and Judge Hand reached their conclusions and sets up a distorted picture of the record.

Passing reference may be made to page 33 of appellee's brief, wherein it is stated "that it took the entire output of the gas produced at the Astoria plant by the Astoria Light, Heat & Power Co. * * * operating at the time of the trial, coal gas plants A. and B. and water gas plant C." There is, of course, a distinction between the "entire output" and the "entire capacity," this being important because of the fact that we have shown the modern Astoria plants were not worked to anything like their capacity.

At page 34 of the brief it is asserted that the Master swung far away from the actual operating costs and adopted the lowest operating costs which he figured could have been attained through the operation of the plants "not of a reasonable and usual type, but of the highest modernness and efficiency." There is not a particle of proof in the record that the plants are of the highest modernness and efficiency. At page 35 of appellee's brief it is asserted that the Court below "eliminated every element of return upon investment in other's property." It is evident that all of the Astoria property was included in the rate base and the Court below added the estimated cost of a very large additional unit of property which was not built at the time of the decree and which was therefore not used or useful in the gas business.

At page 36 it is stated that the Court applied to the operating results per thousand cubic feet of gas sold a supposititious spread of 20,000,000,000 cubic feet "which

was not realized in the year 1919." It will be remembered that during almost every day of the trial in December, 1919, and January, 1920, complainants were trying to get into the record figures showing enormous increases in the sales of gas and, in fact, they argued they had to have a greater reserve capacity because of the enormous increase in the daily send-out. The main point, however, about this misleading statement of the appellee is that it attempts to show the Court was stating the rate was confiscatory in 1918 or 1919, whereas it seems very evident that the Court in its findings ignored almost every other claim except that in future this statutory rate would prove to be confiscatory. If appellee had been content to charge the $.80 rate there can be no question that the sales would have reached 20,000,000,000 feet, but when you increase a rate by nearly 100 per cent., you cannot expect the sales to maintain the steady increase that has been apparent for many years in New York City.

It is hardly necessary to answer the statement made by appellee at page 36 of its brief regarding Little's showing of a profit from operations in the year 1919, because we have already mentioned the fact that his final figure takes into account large amounts of expenses reported by the company which he believed to be unreasonable, but which he took merely for the purpose of rounding out his figures.

At page 37 of the brief of appellee, it is claimed that the Master or the Court did not make any allowance for necessary surplus which the law requires the Public Service Commission should make in fixing rates.

The obvious answer to this extravagant claim is that a surplus is needed for contingencies, and when the period arrives when this surplus is to be used, a gas company cannot then claim it must have all of the reported expenditures, reasonable or unreasonable, which it had in the operation of its plants, and that it must have additionally

(a) a standard rate of return such as is had by well-managed companies in normal times, and (b) a surplus to cover contingencies. The statement of appellee at page 41 of its brief that appellants kept out figures later than the year 1919 because the results were unfavorable to the defendant's claim is a piece of presumption that should not go unanswered. The record clearly shows that everybody but complainant agreed that the bringing in of these figures would open up the whole case again and lead to interminable delay in arriving at a decision.

On page 42 it is claimed that "the statute did not contemplate the abandonment by any gas company of its mode of business in order to find a possible means of encompassing its costs and profit within the rate limitation." This is an amazing statement. The Legislature evidently contemplated that this gas company, like all others, would keep abreast of the times and do at least as much for itself as it could expect the Commission or some other State body to do for it. A reasonable rate contemplates reasonable operations. The Legislature makes laws to protect not only capital but also to protect the consumers of a public utility. And if the Legislature was sadly negligent in its duty and made a law which permitted a public service company to operate any kind of a plant that it saw fit, under the worst possible conditions of management, could the Company then come in with a claim that it must be allowed unreasonable operating expenses, plus a reasonable return, plus a surplus for contingencies, plus an amount sufficient to amortize obsolete property?

The facts stand out in this record that complainant has had, from the beginning, a reserve for depreciation and should have used part of that reserve years ago to wipe out the depreciation which has accrued. Is the depreciation any less a fact because appellee has been content for years to make gas in obsolete plants rather than retire those plants when their retention was not justified?

At page 43 of the brief, appellee sets up an alternative method which it asserts could be used by the Court in ascertaining the present fair and reasonable cost of manufacturing gas. It relies for this argument upon the testimony of Woods, who put in an estimate of cost to produce water gas and coal gas in two small hypothetical plants. How can the Court determine from Woods' testimony, based upon such imaginary plants, and by his use of costs of material prevailing October, 1919, or of estimates of costs projected into the future, whether or not the rate was confiscatory during the period covered by the trial, that is, the 20 months ended August 31, 1919?

VII.

Appellee's statement that there is no merit in the claim of appellants to the effect that it did not comply with the 22-candle power standard fixed by the statute is mere assertion.

Throughout the argument (appellee's main brief, Point X) appellee completely loses sight of the fact that Chapter 125 of the Laws of 1906, Section 2, specifically provides that the gas furnished shall have an illuminating power *of not less than 22 sperm candles of six to a pound*. Appellee's whole argument is based upon the assumption that if it gives somewhere close to *an average* of 22-candle power it complies with the law, whereas the law does not permit of any gas corporation in the City of New York sending out with impunity *at any time* gas which is of *less* than 22-candle power.

It is mentioned in the brief that the Special Master found as a fact that the appellee had complied fully with the provisions of the act with reference to candle power. But the Master had no basis for making such a finding, because it is not a fact.

At page 290 of the brief there is a quotation from the Master's opinion to the effect that he believed appellants conceded that, in order to make 22-candle power gas, it should be made of a 23½-candle power at the works, as follows:

> "I am satisfied that the gas made by the complainant company was always at least 23½-candle power."

Appellant Swann believes that the Master should have known better than to make any such finding, because he knows very well from the record that even if *complainant* at all times made 23½-candle power gas, that does not necessarily imply that it furnished statutory gas

to its consumers. *It did not make all the gas it sold*, but purchased huge quantities of it from subsidiary companies that it controls. Even if appellee made *26*-candle power gas at all of *its* plants there would be no substantial guarantee that it did not purchase a much lower quality gas and that the mixed bought and made gas did not go below the statutory requirement on hundreds of occasions.

Appellee seeks to maintain this false conception of the record and claims that Mr. Little, "defendants' principal witness," admitted that in order to produce gas testing 22-candle power one mile from the works, "it is necessary to make on the average 23½-candle power at the works. If this is kept up the candle power on the district should be 22 (testimony of Mr. Little, p. 11354)" (Brief, p. 294).

Appellee claims that the Master based his finding upon an opinion of the Honorable Oscar S. Straus, dated October 13, 1917, describing certain tests made of the appellee's gas by the Commission's engineer. Reference to the opinion of said Oscar S. Straus shows that the tests relied upon by the Commission were those made by the City of New York through its official gas testers, whose work at that time was supervised by the Engineer of the Commission, Mr. Hine. The Commission itself has no apparatus for testing the candle power of gas. Even if it did have, and if the tests were made as appellee claims, we do not see of what interest it would be to this Court, because the gas so tested referred solely to service given prior to October, 1917, whereas what this Court is concerned with is whether or not appellee delivered statutory quality gas during the period covered by the issues in this case.

In proof of our claim that the City tests were relied upon by the Commission we refer the Court to page 14360 of the record.

In connection with this candle power testing we also ask the Court to examine page 14361 and page 17020, where it is conclusively proven that gas of less than the

statutory quality was furnished to the consumers, who were thus robbed by the appellee. In proof of our claim that the furnishing of low candle power gas amounts to collection of money under false pretences, we refer the Court to pages 17022 and 17024 of the record.

The Master was of the opinion, as shown on page 290 of appellee's brief, which quotes from page 58-a of the record, that the City inspectors were not in all cases correct in their observations of the candle power. Why, then, should he rely upon the opinion of the Honorable Oscar S. Straus, which was based upon the work of the City's gas inspectors, and then reject the *definite proof* in this record by said gas inspectors that the candle power requirement of the statute *was not complied with*? The Master in his opinion concerning the work of the City testers relies upon the testimony given in rebuttal by Mr. Terry for appellee, but it is shown by the record that Mr. Terry, who had the temerity to attempt a correction of certain calculations made by the City testers, himself made mistakes in his computations, and was quite unreliable as a witness.

In appellee's brief (page 291) it is claimed that the Master's opinion is confirmed by the declarations "of the principal witness on behalf of appellants." It is asserted that

> "The witness Little (page 11318), when asked whether he considered the candle power standard a proper way to measure the quality of gas, answered: 'I think it is a crime, that is what I think.'"

Counsel for appellee refers this Court to page 11318 in support of this, but he does not ask the Court to look at page 11317, where Little showed that he put the British Thermal Unit standard into force in Illinois where at that time, in the City of Chicago, 22-candle power gas was being furnished. He testified:

> "A. Yes, with the saving clause in the beginning of General Order 20, which prevented any

company from going down below the city requirement unless it came to the Commission and adjusted its price."

We also refer the Court to the following:

"The Master: I am inclined to say something in my report on that point. I think it is pretty nearly time a stupid standard of that kind is eliminated, if everybody agrees to it.

Mr. O'Brien: The question is where the public is coming in, if they are going to get a corresponding decrease in the price.

The Master: Of course, they will if it costs less.

Mr. O'Brien: If this company is going to work and get a couple of million dollars out of Uncle Sam when this case is over for the results of making toluol, we ought to know it. The people ought to get the benefit for the failure of the company to deliver the candle power in 1917 and 1918.

The Master: You are talking about one thing and I am talking about another. If the standard is changed from the candle power standard to the British Thermal Unit, and it costs less under that standard or on that basis, then, of course, the public ought to get the benefit."

One of the witnesses for appellee took a small part of Little's testimony regarding candle power and tried to use it in another gas case in the City of New York then being tried in the Federal Courts. As a result of the tricky way in which *part* of this testimony was used, the appellant Attorney General (Newton) attempted to recall Little as his witness in order to straighten the matter out in the instant case. But the Master was apparently well satisfied to have the record stand as it is, as shown by the following colloquy:

"Mr. Chambers: I ask that I be permitted to ask Mr. Little a few questions on re-direct. I haven't had an opportunity yet to do it because we closed so suddenly. I was waiting for that opportunity. It would not take long.

The Master: Application denied. *I am not going to take a chance.*

Mr. Chambers: The record will not be complete—I mean there are some things that ought to be explained on re-direct, it seems to me.

The Master: Too late.

Mr. Chambers: Why, because of something I have done?

The Master: No, because the witness is excused. Call your next witness, now.

Mr. Chambers: Exception" (Record, p. 12434).

When the witness, Edward W. Bemis, for appellant Swann, was on the witness stand, this matter of candle power again came up for consideration, and the Master sustained an objection to a question put to the witness Bemis, who had represented the City of Chicago for three or four years in the matter of testing the candle power standard at the time Mr. Little was engineer of that Commission. The following colloquy took place between the Master and counsel:

"The Master: Objection sustained.

Mr. O'Brien: Because it is not definite, your Honor?

The Master: No, because I won't take any proof of any opinion on that subject. We are dealing with a condition here created by a statute. I am not going to take any proofs as to what the witness's opinion is about it.

Mr. O'Brien: Were the questions put by your Honor to the witness Little, supposed to be off the record and not part of the examination of the witness?

The Master: Oh, it is not material at all in this case. I have forgotten how it came about at that time. It was a pure matter of information.

Mr. O'Brien: It was examination by the Master.

Mr. Ransom: The witness volunteered such statement in connection with the cross examination.

The Master: However it came about, the fact is that we have a statute that requires 22 candle power.

Mr. O'Brien: Well, I am glad to hear your Honor say that.

The Master: What did you expect I was going to do about it?

Mr. O'Brien: That examination of the witness made by you in reference to the matter was under such circumstances that it was pretty hard to say what my relation, or what the defendant's relation to it was. You asked the witness several questions that were not cross examination, and he gave you answers to them.

The Master: What can I do about it? I can't do anything about that.

Mr. O'Brien: I cannot see how you could do anything. The answer is what you said, it is the law. It is like prohibition, we are all railing against it, but it is the law. That is the way I feel about it, that we have a statute here, and a good many men have opinions as to how to get the most for the gas out of any law that regulates the making of gas.

The Master: All I can say about it is that I think Mr. Little is correct in his statement that it is for the benefit of the oil companies and is not for the benefit of the consumer, but that is the law.

Mr. Chambers: What, the candle power?

The Master: Yes. I think the people would be better off without that candle power requirement."

At this point in the trial, counsel for appellant Newton again attempted to call Mr. Little, as is shown by the following excerpt:

"Mr. Chambers: I want to call Mr. Little.

The Master: What is this on, entirely new matter?

Mr. Chambers: Yes, I would say so.

The Master: Well, I won't say so. Let me hear what the subject is. If it is anything which was touched on in his examination, the direct, the cross, the re-direct or the re-cross, or whatever it is.

Mr. Chambers: The subject was.

The Master: Then I won't take it.

Mr. Chambers: Wait a minute.

The Master: Mr. Little, leave the stand. What is the subject matter?

Mr. Chambers: The number of open flame burners in existence in Manhattan and what he would say about candle power if he assumes that my number of open flame burners is correct, which I will prove, just that one question.

The Master: What is that on, the question of the usefulness or wisdom of the law?

Mr. Chambers: Well, I would not say that. He would say whether it would be possible to dispense with candle power, assuming that number of open flame burners.

The Master: No, I won't take it. That is not useful in this case.

Mr. Chambers: Let me put the question.

The Master: No, I won't let you call the witness for the purpose stated.

Mr. Chambers: Let me put the question to him.

The Master: No, I won't let you recall the witness for the purpose stated. I will give you an exception.

Mr. Chambers: I did recall him.

The Master: I refused to let you to recall him, and I give you an exception.

* * * * * * *

The Master: But if you had some other standard you could change the burner, couldn't you?

Mr. Clark: They would have to burn more gas to get that much light.

The Master: I am not going into it.

Mr. Chambers: I want to show by Mr. Little that if that is so——

Mr. Clark: You have already expressed yourself on it.

The Master: I did not, it was Mr. Little. *I am not going to litigate the wisdom of this statute.*

* * * * * * *

Mr. O'Brien: But, your Honor, there is a statement made there, and it is going into the record. Will you strike out the statement from the record made by the witness Little as to candle power?

The Master: No.

Mr. O'Brien: Well, you have said that it was not material in this case.

The Master: I won't strike it out.

Mr. O'Brien: Do you consider it immaterial? Will you say that on the record?

The Master: No, I won't say it either way. I do say that I did not see that this legislation can be affected.

* * * * * * *

Mr. Clark: * * * You have expressed yourself to the effect that this is a fool statute, and asked Mr. Little about it.

The Master: I based it on Mr. Little's testimony.

Mr. Clark: You opened the question, you opened the issue, and it has been tried in the newspapers.

The Master: This case is going to be finished upon the issue of this case. If Mr. Little is in town when this case is completed, and I can let Mr. Little explain the statement that he made for his own protection on the record, I am going to let him do it, but I am not going to let it go in now.

Mr. O'Brien: If he is not in the city will you receive an affidavit from him to that effect?

The Master: No, I won't do that, because Judge Ransom might want to cross examine him on the explanation that he then wants to make" (Rec., pp. 13001-7).

This colloquy occurred towards the end of a session, and there was not the slightest ground for the Master's refusal to let Mr. Little testify on re-direct in full explanation of his statement concerning the candle power question. It is our belief that the attitude adopted by the Master was nothing more nor less than a despicable piece of trickery. A court of equity should get the facts. The Master evidently did not want the facts in this case, so far as the candle power requirement is concerned.

Appellee in its brief wishes this Court to place some reliance upon the testimony of Mr. Barnum, an officer

of one of the gas companies in the State of Massachusetts who, according to counsel for appellee (Brief, p. 291), "testified that candle power is obsolete in Massachusets and almost everywhere else except in New York" (Record, p. 11531).

A reference to the record will show that Mr. Barnum was called for further cross examination by appellee (Record, 11525) after he had been subpœnæd by the appellants to identify certain oil contracts. On re-direct examination by Mr. Chambers this witness attempted to give some testimony concerning candle power, but it was conclusively shown that he had no knowledge whatever concerning the subject on which he attempted to give testimony (Record, 11530). It was when his lack of knowledge on this matter of candle power was shown that he offered a lame explanation of why he was not familiar with the method of testing gas, and it is this lame explanation that counsel for appellee wishes to use in support of its failure to furnish statutory quality gas (11531).

How can the witness Barnum testify as to the merits of the candle power standard when he admitted that he had never made 22-candle power gas (Record, 11533)?

Counsel for appellee tries to make a point of the conceded fact that the City testers did not use, in making the tests, candles of "six to the pound" (Brief, p. 296). When this matter was brought up the witness, William Birdsley, who has for years been in charge of all City tests for candle power, was asked if the result was any different by the use of two candles, and he stated the result would be the same. He was then asked the question:

> "Q. Will you explain how it is done?
>
> The Master: No, we have had that before.
>
> Mr. O'Brien: Your Honor has asked the question before, and I crave the permission to ask this witness a question on that myself.
>
> The Master: It is already covered.

Mr. O'Brien: And I want a complete explanation.

The Master: I won't allow any more.

Mr. Chambers: Exception.

The Master: The record is complete on that subject. The witness's testimony is perfectly clear. He says that they get the same result calculating it down when they use two candles, so that the result in his judgment is better than if they used one. Is that correct?

The Witness: That is so" (Record, p. 12848).

Notwithstanding this very clear testimony, counsel for appellee claims that the City testers use faulty methods (Brief, p. 297).

Counsel for appellee makes an attempt to have this Court decide that it is practically impossible for gas testers to make accurate readings in order to determine whether or not there has been compliance with the candle power requirement of the statute. This is shown by this labored argument on page 296 of the Brief. This might be excusable in an attorney new to the gas business and not familiar with the work done by the Public Service Commission, of which he was at one time counsel. He should know—if anybody should—that this method of testing the quality of gas has been in use for 51 years. It is a well known fact that when candles are burned at the rate of 120 grains per hour the candle light is standard. *There is no other standard of light known.* Every artificial light used in the civilized world is rated in terms of this standard candle. For upwards of 40 years this method of testing gas by official city gas testers was a legal procedure and its results have been evidence for action against gas companies in the event of default, as is common knowledge to those in the gas profession who are acquainted with the methods adopted by the British Parliament for use of the "London Gas Referees."

At page 296 of the Brief, counsel for the appellee states, that "even a skilled city tester upon the witness

stand was unable to work out the same result on going over his work a second time (Rec., p. 13625)."

Reference to page 13625 of the Record shows that at that time Dr. Edward W. Bemis was on the witness stand, and his testimony runs from page 13570 to page 13636, so that this claim of appellee is without foundation.

In the brief of appellee at page 298 it is claimed that appellants cannot escape the conclusion that appellee constantly made *"at its works"* gas of the quality said by appellants' only expert to be necessary to supply 22 candles in the district; and, furthermore, that appellants' proof shows that, by the City's own tests, the appellee constantly furnished gas of 22 or more candle power *on the average*. This recurring claim that appellee operates to an average shows that it either does not know the law or is not concerned with living up to it. The furnishing of an *average* candle power did not comply with the law and did not result in consumers getting the quality of gas that the Legislature said they should get at the rate of $.80 per thousand feet. A variation in the quality of a gas from, say, 19 to 23, might be considerably worse for the consumers than the furnishing of a gas consistently testing as low as 20-candle power. In both cases the consumer would be "bilked," but he would be even worse off with the variable quality which is not permitted by the statute than with 20-candle power consistently.

On the same page of the brief (298) counsel for appellee claims that, during the excessively cold winter months of 1918 and 1919, thirty-five miles of the company's mains in the City of New York were exposed to the elements on account of the subway construction. It is true that some mains were exposed. There is no evidence that anything like thirty-five miles were exposed. There is no proof that it was necessary to expose the mains, because they could have been protected from the elements by means of an insulating covering such as is used on steam pipes. Furthermore, there is nothing in the law which says that a company is to be excused if it does not properly protect its pipes.

There is another thing which the Court can consider and that is, condensation results when some of the rich hydro-carbons drop out of the gas, but this is not the case where gas is stripped of these rich hydro-carbons; but during the year 1918 the gas *was stripped* for the benefit of the United States Government to secure toluol, and, therefore, the condensation of the rich hydro-carbons that usually takes place in exposed mains did not take place in respect to these rich hydro-carbons because they had already been removed by stripping process at the works.

At page 298 of the brief the claim is made that it is during the cold winter months that this condensation takes place and robs the gas of some of its candle power. Appellee relies on the witness, Addicks, for proof of this, but if we refer to Addicks' testimony, page 14401 of the Record, it will be seen that he claims the candle power of the gas is adversely affected even in the summer time by sudden changes in the outside temperature, so that the severity of the winter does not seem to have anything to do with it.

Under the heading of "The period of toluol extraction by the Government" counsel for appellee in his brief, page 299, sets up the claim that the complainant could not comply with the candle power standard because the Government operated oil plants for stripping the gas. How is this Court going to decide just what the claim of appellee is when appellee first states there has been no departure from the statute with respect to candle power and next states that the violation of the statute was caused by the Government. The Government took out the light oils, it is true, but it only wanted toluol and refused to use benzol in the making of munitions, notwithstanding the strenuous efforts on the part of Little to have the United States Government to do what every other Government was doing, and that is, make picric acid for explosives with benzol as the base. The benzol that the Government took out with the other crude oils was left available for enriching the gas, and even if the was left available for enriching the gas, and ap-

pellee could easily have brought it back to 22-candle power as other companies did by carburetting with benzol and injecting the vapor into the commercial gas as the gas was leaving the plant. Appellee did, in fact, get benzol from the Government and put it back into the gas; but it contends that it put back all that it had and that the Government did not let it put back enough benzol to bring the gas back to the statutory candle power (Rec., p. 14321).

Appellee claims, Brief, 301, that it used the quantity of oil which would produce 22-candle power in the district but the military power of the Government reduced this to the figures actually resulting. The Government, in its orders, intended to protect the consumers against poor quality of the gas and made a contract with appellee to reimburse it for any additional oil it used to make up the candle power after the Government had stripped out the toluol. Appellee during the trial claimed that the Government was in sole charge, but the record shows conclusively that it was not the Government but some individual dressed with a little brief authority who issued what appellee dignified by the name "order" regarding the amount of oil to be used. The Government wanted all the toluol it could get. Toluol is derived from water gas to the extent that oil is used for carburetting the gas, and the more oil the Company used, the more toluol would have been recovered. There was no excuse, therefore, for appellee failing to put into the gas sufficient oil to give the Government the toluol it needed and at the same time give the consumers of gas the candle power required by statute. Appellee puts all the blame on the Government, but there is nothing in the record to show that the United States Government wanted toluol during the year 1919, so that the failure to give 22-candle power in that period can certainly not be charged up to the Government.

On page 302 of the brief counsel for appellee states "the civil obligation to furnish gas of 22 candles was necessarily subordinated to the exigencies of public necessity." If that is not an admission that appellee did **not** comply with the law, we don't know what it is.

VIII.
Working Capital.

Under the heading Point XI at page 305 of the brief, counsel for appellee takes up the subject of working capital allowed by the Court below. Appellee seeks to have this Court believe that the witness Little attempted to pass upon the amount of working capital for the Astoria Company. Reference to the record (pp. 12431-2), shows that Mr. Little in no way attempted to appraise the property or give any testimony in respect to working capital. He was not asked, as is stated on page 308,

> "Whether he, in his voluminous report and many-phased computations, had made any allowance for working capital."

What he really was asked was as follows:

> "Q. In making up your computations in which you figure the various expenses and the return on certain portions of investment used in producing gas for the consumers of this Company, I notice that you have not made any allowance for working capital?"

to which the witness replied:

> "A. I have in the Astoria."

Counsel was evidently somewhat surprised because he stated:

> "Q. You have. What allowance did you make? A. Well, it is classified on Sheet 5 as 'Return on materials and supplies in stock,' which covers cash. In other words, it may be in the form of cash ready to buy or it may be in the form of material purchased with that cash" (Rec., 11326-7).

Great stress is laid upon some questions put to the witness, Little, on cross examination covering some tes-

timony he gave in the *People's Gas* case in Chicago concerning working capital. This testimony is as follows:

> "Q. Now, in the People's Gas case did you not estimate that a proper allowance for working capital in the form of materials and supplies and cash working capital should be $.25 per thousand cubic feet of gas sold?
>
> A. That was a very rough figure, yes. In the People's Gas case I did not make any detailed appraisal, but suggested that figure, it having been used by the Commission in some other cases.
>
> Q. That figure of $.25 per thousand cubic feet of gas sold for materials and supplies and cash working capital, was a figure which had been adopted by your Commission in various cases?
>
> A. *In some smaller cases*" (Rec., 11327).

Little did not attempt to pass upon the figures on the Astoria Company's books reflecting working capital, but merely used the figures there appearing to round out his report, as is clearly shown by the record. If he had attempted to pass upon the reasonableness of the Astoria figures for cash working capital he would undoubtedly have taken into account the testimony of the accountant, Sangster, who worked closely with him in the preparation of the engineers' and accountants' reports. He would undoubtedly have noted that since the Astoria Company commenced operations the assets increased to practically $18,000,000 to which increase the Consolidated Gas Company only contributed $8,115,000, the remainder being obtained from surplus earnings, reserve set up out of operating expenses or surplus and other liabilities (Rec. 11740). Little would not have recommended, in addition to a return on book cost which was built up to such an enormous extent out of earnings, a return on any additional amount representing hypothetical cash working capital.

The appellant Swann has not attempted to deal with this matter of working capital in detail at this time because it has already been fully covered in the main briefs of appellants.

IX.

Some criticisms of appellee's attack on the "Rate Base."

Under Point XII, at page 317 of the brief, counsel for appellee deals at length with the matter of the rate base found by the Court below.

We believe it is, at this time, unnecessary to again go into this matter in detail, as it has been amply and ably covered in the brief of the appellant, Newton. We do, however, wish to take up that part of appellee's brief which states (p. 346) that until another plant of corresponding capacity is provided to take the place of the 14th Street and 42nd Street plants, and the investment in these plants has been amortized, they must be included in the property upon which the Company is entitled to earn a return. Appellee claims "without an adequate rate such property cannot be amortized and replaced by modern plants." The stand here taken by appellee seems to be it can run obsolete plants as long as it wishes and make the consumers pay a rate based upon unreasonable operating costs. There is evidence to show that in past years appellee has set aside sums to take care of obsolescence and inadequacy in its plants and it has certainly *earned* sufficient to take care of depreciation which has taken place. Appellee, furthermore, loses sight of the fact that if it had scrapped these obsolete plants years ago, when it knew they were obsolete, the extra profits made by the operation of modern plants would have wiped out any possible loss caused by the scrapping of the obsolete plants. Just look for one minute at what happened at Astoria where the Company built up the bulk of the property out of earnings, as is shown by the report of Andrew Sangster, the accountant called by appellant Swann (Rec., 11740).

There is just one other point which we wish to discuss in connection with appellee's brief and that is the

statement on page 356 to the effect that the amounts of investment respectively found by the Master expressed the very emphatic view "fortified by the testimony of the defendant's principal witness (Mr. Little) that the investment is '*properly valued*' at *twice* the amount at which the Court allowed the same in its rate base." This Court will certainly search the record in vain for any evidence to support the claim made by appellee that Mr. Little, by his testimony, fortified this so-called emphatic view of the Master. Mr. Little gave no figures whatever on the value of the property. He very properly distinguished between cost and value and refused to usurp the functions of the Court. In answer to a very strenuous request by the Master, he brought in some figures showing roughly what he thought was the actual investment required in gas properties per thousand cubic feet of gas sold per annum.

In concluding our reply to the contentions made by appellee concerning the rate base, we would like to have the Court consider the claim made at page 385 of appellee's brief that the setting aside of a reserve, to take care of the depreciation which is inevitable in all gas property, would put a burden on the present consumers each year. Appellee has done the very thing which it claims should not be done, and that is, has charged against the consumers in past years sufficient sums to amortize obsolete property. By a stroke of the pen it wiped out the depreciation and contingent reserve and transferred it to surplus. Having had the money, it now says that it will not need any more; but it asks this Court to refuse to deduct from its investment the amount of money contributed by the consumers to take care of the investment that was wiped out by obsolescence in the properties.

Conclusion.

We have searched the brief of appellee in vain for any reference to what is perhaps the most important subject in connection with the matter of reasonable operating expenses, and that is, the fair cost of producing gas by the modern coke-oven or chamber-oven system. In the main brief of appellant Swann this matter is dealt with in detail, reliance being placed on the uncontroverted testimony of defendant's engineer, Little, who showed conclusively that enormous savings would have been made if appellee had kept abreast of the times by putting in modern gas production equipment.

Does it not appear that appellee is afraid even to touch upon this subject, because it knows that if it attempted to make a brief based on the record, its claim of confiscation would fall to the ground. We ask this Court to again note that the only rebuttal testimony put in by appellee concerning the coke-oven and chamber-oven method of making gas was that of a commercial man, Mr. Doane, whose naive admissions concerning the lack of policy displayed by this Company in the past amply support rather than refute the claim made by Little that gas could have been produced economically if appellee's executives had performed their manifest duty.

Respectfully submitted,

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Appellant, Edward Swann,
District Attorney of the County of New York,
Municipal Building,
New York.

JAMES A. DONNELLY,
HARRY HERTZOFF,
of Counsel.